UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATHAN SMITH, .
.
Plaintiff, .
. Civil Action
VS. . No. H-07-CV-784
.
THE ABANDONED VESSEL, et. al., . Houston, Texas
. October 22, 2008
. 9:52 a.m.
Defendants. .
. . . .

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID HITTNER
HEARING

APPEARANCES:

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PROCEEDINGS RECORDED BY STENOGRAPHIC MEANS,
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PROCEEDINGS

October 22, 2008

THE COURT: Court calls the case Civil Matter 07-784, Smith versus The Abandoned Vessel.

Who represents the Plaintiff?

MR. GREENE: Adraon Greene on behalf of the Plaintiff with Schwartz, Junell, Greenberg & Oathout. Mr. Schwartz is the attorney of record, Judge, but he is away on another case this morning. He's actually in trial.

THE COURT: So your name is Greene?

MR. GREENE: Yes, Your Honor.

THE COURT: All right.

And for the defense?

MR. WALKER: Ron Walker and Terry Carroll.

MR. CARROLL: And we're actually for the intervenor, Your Honor, but it's the other side.

THE COURT: Well, you're the intervenor. Who's missing?

MR. CARROLL: The ship.

THE COURT: Mr. Greene, who's missing?

MR. GREENE: The ship is missing, Your Honor; but there is no one representing --

THE COURT: Is it an in rem action?

MR. GREENE: Yes, Your Honor, it's an in rem action.

THE COURT: Okay. So, in effect, these are the contests, right?

MR. GREENE: Correct, Your Honor.

THE COURT: All right. This is a final pretrial conference. I have a handle on what it is. The question is 09:53:22 it's a ship -- do you know if the ship's there or it's allegedly there, down below?

MR. GREENE: We haven't done any magnetometer type readings, Your Honor; but from everything that Mr. Smith has discovered, we have a general idea of the vicinity that the ship 09:53:36 is in; and it's in Melon Lake or the reaches of the waters of Melon Lake.

THE COURT: Okay. What do you --

Hold it. I'll get to you in a second.

What's your position? Are you entitled to this?

09:53:46 MR. GREENE: Yes, Your Honor, we are entitled to it.

THE COURT: Why?

MR. GREENE: One, as the first finder, Your Honor, and as the only person who has asserted title and possession to the ship, Judge. The ship is in navigable waters.

09:53:58 THE COURT: That's a question, isn't it, as to where exactly it's located?

MR. GREENE: Yes, Your Honor. And it's our contention that the ship is in navigable waters. Melon Lake forms navigable waters because it connects with Melon Creek, the 09:54:10 Mission River, and Copano Bay which is a -- which empties into

09:54:28 09:54:48 09:55:08 09:55:18 09:55:30

the Gulf of Mexico, the intercoastal highway (sic), Your Honor.

THE COURT: What's your response?

MR. WALKER: Judge, the area where he says the ship is located -- and there's no evidence to our -- that there is a ship out there; I think there's a piece of wood he might have found -- is on dry land. It's not in Melon Lake. And even if it were in Melon Lake, it's --

THE COURT: What do you have -- to get to it, you have to go down with a -- with a submersible, you got to dig into a muddy bottom, like, with a dredge or do you have to go up on land with a front-end loader?

MR. WALKER: Judge, the easiest way to do it -- I was there yesterday -- is to -- is to -- there is an old road that goes out there. So you would get off the highway, drive down the road, and drive to a dry piece of land, and start digging. It is not in navigable waters.

THE COURT: How do you know it's down there?

MR. WALKER: Well, he gave the coordinates.

THE COURT: Yeah.

MR. WALKER: So we went to the coordinates and it's -- it's my opinion it's dry land.

THE COURT: All right, what's your response?

By the way, I'll try this case but I just want to get a feel for it.

MR. WALKER: Yes.

THE COURT: Go on.

MR. GREENE: The response, Your Honor, is what Mr. Smith has given is a general location. Again, he does not know for sure that the ship is at this particular area. And in his complaint he says that the ship is in, I think, a 600-yard radius of a certain area.

So without having a magnetometer to go in and actually know the exact location of the ship, we know it's in Melon Lake or the reaches of the waters of Melon Lake; and that is our contention.

THE COURT: The reaches of the waters, what does that mean? Is that where it used to be -- the water used to be and then it receded? Or is that -- when you say within the reaches, is that still underwater?

MR. GREENE: It's our contention, Your Honor, that it is underwater, that the water may undulate with the tides; but again, because we haven't been there with the proper equipment to know the exact location of the ship, we can't say that it's at this particular coordinate at this particular --

THE COURT: How do you know it's there?

MR. GREENE: Based on the research that he has done, Your Honor, the satellite imaging that he's done, everything to him -- to Mr. Smith indicates that the ship is here. It's in this location based on the satellite images, the old maps that he's looked at, the research that he's done. That's our best estimate as to where the ship is.

THE COURT: All right. You don't know where the exact coordinates are that -- if you start digging tomorrow, where are you going to go, on dry land or in the water?

MR. GREENE: In the water.

THE COURT: All right. Now, what about that -- you say it's -- he said he's going to -- he wants to get into the water. And your position is if he goes in the water, is he still out of bounds?

MR. WALKER: Our position is that Melon Lake is not navigable waters. Now, the Mission River is within 600 yards, I would think, and that is -- the Mission River is navigable waters. So I don't -- it is possible that it's navigable water; but where he wants -- where the coordinates are is on dry land. 600 yards would go out into Melon Lake which there is water, but we say it's not navigable.

THE COURT: All right. What's your -- what's the law on this as to what's a navigable, you know, waterway relative to a lake as an offshoot of a stream, an offshoot of a river?

MR. GREENE: The law, Your Honor, is in Richardson versus Foremost out of the Fifth Circuit which says if the waters are capable of forming -- are capable of forming and connecting with other waterways, a waterway that's capable of supporting interstate travel, that's the definition of navigable --

THE COURT: In your estimation can you get from that lake in some sort of a commercial boat or whatever and go all the way out into the river?

MR. GREENE: Based on what Mr. Smith has told us, Your Honor, based on what the expert is telling us, we think we can.

09:58:20

THE COURT: All right. But you don't know, you haven't been out there?

MR. GREENE: I have not, Judge. And Mr. Smith has been there and he says that he has navigated from the Mission River through Melon Creek into Melon Lake to where the ship is located.

09:58:32

THE COURT: Have the lawyers been out there, your lawyers?

MR. GREENE: No, Your Honor, we have not.

09:58:40

THE COURT: Do they have an interest in getting out there to take a look?

MR. GREENE: We would definitely have an interest in doing it, Your Honor. Time has not allowed us to do it at this point.

09:58:48

THE COURT: Why not?

MR. GREENE: Well, just scheduling.

THE COURT: Have you asked the Court just to give you -- what, it will take you half a day. Go out and take a look around. You know, get in a boat and see if you can get into that -- you know, get from the -- from the -- what is it, from

09:58:56

09:59:12 the lake to the stream to the -- to the river.

I'm not -- don't get me wrong. I'm going to try this case. It's an interesting case. But I'm saying if you need access there, if they won't give it to you to look around, then you ask me. But if you haven't asked them, the first question I have is you can talk to your client until you're blue in the face but how are you going to make a decision as an attorney going to trial if your firm hasn't been out there and taken a look around maybe with an expert of yours?

09:59:30 MR. GREENE: Well, Judge, we rely on what our client is telling us. We believe that he's telling us that he has been in a boat and gone from the Mission River up through Melon Creek into Melon Lake. We have no doubts about what he says he's done. Everything that he has told us so far, for the most part, 09:59:44 Your Honor, has been true. All of the research that he's done, from what we can tell it's true and accurate. We believe him when he says he has done this.

THE COURT: How far is that from here, Refugio County?

MR. GREENE: They have a better --

10:00:00 MR. WALKER: Judge, it's about two and half hours, two hours and forty-five minutes. It's between Victoria and Corpus.

THE COURT: All right. What I'm going to say, we're going to set this case --

Ellen, we're going to set this for trial, all 10:00:06 right?

10:00:12 10:00:24 10:00:34 10:00:42 10:00:58

THE CASE MANAGER: Yes, sir.

THE COURT: We're going to set this for trial. But before we get to trial, I want the lawyers to get out there and take a look around.

MR. WALKER: Okay.

THE COURT: You work with them and just get the lawyers and any witness they have out there. It may resolve itself. It may or may not. It may not because, you know, we all take clients as we find them. But before you go to trial, I want the lawyers to be able to at least say they've been out there and looked around. And apparently, defense has no objection to giving you access.

Is that correct?

MR. WALKER: That's correct, Your Honor.

THE COURT: All right. So do it.

MR. GREENE: Yes, Your Honor.

THE COURT: Okay. And pass it back on to your firm that I expect them to get out there and do it. If they want to take their hydrologist or their water guy with them, take it with them and just walk around. That's number one because, at least, I want the lawyers to be able to speak from personal knowledge as well as the client.

How much -- how much -- what are you suing for, declaratory judgment?

MR. GREENE: Yes, Your Honor. We're suing -- I'm sorry.

THE COURT: Yeah. As to what?

MR. GREENE: As to, one, title, ownership, and possession of the ship under the law of --

THE COURT: We don't know it's there. There's no -- there's no -- what do they call it in law school, erase. There's no -- there's no -- nothing you can put your hands on yet. So how can you talk about a boat that you don't even know is there?

MR. GREENE: Well, I guess to begin with then, Judge, we would begin with the salvage rights because, in order to begin salvage operations to determine if something is there, we need a determination that the waterway is navigable, which would entitle us to salvage the ship if it is there.

THE COURT: All right. By the way, you go out there, you get me some video, also. Take a video camera because I'm not getting out there. There's no need to. But let's get some video that both of you can go in on or if you want to hire a commercial videographer to show -- you know, when you're done, show it to the other side.

I want to see this area. It's a non-jury case. So you need to show it to the jury and get me out there somehow so I know where it is and where the linkup between the lake and, I guess, the stream or the lake and the river that originates from a stream, where does the -- what's the outlet of the river?

Where does it go?

MR. GREENE: The Mission River, Judge?

THE COURT: That's correct.

MR. GREENE: The Mission River goes down to Mission Bay which empties into Copano Bay which goes down to the Gulf --

MR. WALKER: Aransas --

MR. GREENE: -- Aransas --

MR. WALKER: -- Aransas Bay.

MR. GREENE: -- and into the Gulf of Mexico.

THE COURT: Okay. Down the Aransas area.

All right. So anyhow, that's number one. And so, basically, you're suing for a declaration of rights; is that correct?

MR. GREENE: Correct, Your Honor.

THE COURT: What else are you suing for?

MR. GREENE: Again, Judge, once we have a determination that the ship is there, the salvage rights; but ultimately, Mr. Smith wants to be given title, possession, and ownership of the ship and everything that's on it.

THE COURT: All right. Can it be done? Can it be done here in federal court?

MR. GREENE: The -- I'm sorry, Your Honor?

THE COURT: The -- what is it, the -- what you want the Court to declare, is that within the Court's power?

MR. GREENE: Yes, it is, Your Honor. As an in rem proceeding, it's very much within the Court's power.

THE COURT: All right.

Now, defense, please. I mean, your position now is when they get out there, you're going to look at the coordinates and it's on dry land.

10:03:08

MR. WALKER: Yes, sir. Yes, sir.

THE COURT: Mr. Greene, what happens if it is on dry land, then what?

MR. GREENE: Well, Judge, if it is --

10:03:16

THE COURT: Then, you better stick around and see where, for want of a better word, the tide comes in and out because if you say that it comes in and out over that area, I need to see it covered with water.

MR. GREENE: Well, that's what I was about to say, Your Honor. If it is on dry land, then the contention would be it may be on dry land on that particular day or if the land is dry on that particular day, that does not mean that the land is always dry.

10:03:28

THE COURT: Well, you're going to have to show me that or get a historical picture from the county --

10:03:38

MR. GREENE: Yes, sir.

THE COURT: -- from the county records or go to the county newspaper to see if there was ever a flood in that area or -- I don't know if flood will do it. I mean, that's -- rising water due to a flood probably is not -- you know, under

10:03:50

admiralty and/or, you know, water rights is probably not underwater because it recedes, unless you got a special law like they just did down on the seashore that if it washes away and -- that it then inures to the state.

10:04:10 You're going to have to show me a little bit about that, as to if you think water is on there, I need something to see when water is on there aside from a hurricane, I guess.

MR. GREENE: Judge, we think it's covered with water 10:04:18 right now.

THE COURT: Okay.

MR. GREENE: According to Mr. Smith, it's always covered with water.

THE COURT: You get that video. You get your still 10:04:24 camera. Get them both, okay?

MR. GREENE: Yes, Your Honor.

THE COURT: Because if I'm wrong and they're right, kick it up to the Court of Appeals and they'll have something to look at, also.

10:04:32 All right. Yes, sir. Now, for the defense. I've been taking up a lot of time with Mr. Greene. What do you got?

MR. WALKER: Your Honor, what -- how this all started was Mr. Smith went to a Google Earth, saw a shape that he 10:04:46 thought looked like a ship. When you actually do the

10:05:08 measurements of it, it would be more the size of an aircraft carrier. I mean, it's an enormous piece.

What that is is a darkened area of reeds. And on the edge of the reeds, it -- it is a low indentation there with a small amount of water; but it's surrounded by high ground. There's salt grass and salt grass does not grow where there's standing water.

We were out there and it lays between the Mission River and Melon Lake. Melon Lake is not accessible by -- 10:05:30 Mr. Smith, his testimony was he went there by canoe. And we have been out there -- our expert was -- has been out there twice, and they tried to get in by a 17-foot motor boat and were unable to do so, get into Melon Lake.

THE COURT: Did he try a canoe?

10:05:52 MR. WALKER: He did not try a canoe.

THE COURT: Sometimes it gets -- the motor can get tied up in some of that underbrush.

MR. CARROLL: No, Your Honor. In this case the actual front edge of the boat ran flat aground. I was on the boat. It 10:06:06 was not the motor. We had the motor out of the water at the time pulling it.

MR. WALKER: But you know, with a kayak or whatever; but it might be possible to get through this narrow little edge but no any sort of commercial traffic at all. The good news now 10:06:20 -- or maybe -- is that still in -- even though Ike did not hit us in South Texas, the tides are still off; and this is -- it is as high as the owner has ever seen it right now.

THE COURT: And?

MR. WALKER: And you -- from Melon Lake you go through a marshy -- a little marshy area which is called an inundation area by the -- I think the US Department of Agriculture. Then, you step up on dry land, walk to this area. In front of the mound where the -- or the elevated area where "X" marks the spot, there is a little marshy area; but you cannot get there by any type of boat, air boat, anything of that sort.

MR. CARROLL: And Mr. Smith did not get there by even his canoe. He had to stop --

MR. WALKER: Right.

MR. CARROLL: -- because his canoe ran aground --

MR. WALKER: He had to walk.

MR. CARROLL: -- and had to walk.

THE COURT: Portaged -- portaged the canoe?

MR. CARROLL: Oh, he left the canoe and walked in, Your Honor. He said so. And the 600-foot circle -- the 600-foot circle he's talking about is in his complaint; however, in his deposition, he actually marked the spot on the map.

THE COURT: By the way, it's not just the Plaintiff who needs photographs and video. If you've got them, we'll look at them both.

MR. CARROLL: We've got them, Your Honor.

MR. WALKER: We have still photos, but we'll be happy to work with them and get a video.

THE COURT: All right. Let's see. That gives me an overview of what we're doing here. Are you suing for any 10:07:44 monetary damages?

MR. GREENE: We're not suing for any monetary damages, Your Honor.

THE COURT: Okay. Now, on February 22nd of this year, the Plaintiff filed an amended complaint adding a count against 10:07:56 attorneys Killeen and Stern. You seek that Killeen and Stern is not entitled to payment and fees. Have you served them?

MR. GREENE: They have been served, Your Honor. They have not filed an answer so the next step for us would be to seek a default judgment against Killeen and Stern to clean up 10:08:18 the petition -- to clean up the pleadings.

THE COURT: Well, you better do that right away. But you don't have to get a default judgment. At least get an entry of default.

MR. GREENE: Yes, Your Honor.

10:08:24 THE COURT: An entry of default, as you know, is the ministerial act of saying there's no answer on here and their default is, but it doesn't go to a -- what is it, to a final judgment if it's in need of any kind of testimony; and we can consider the testimony at time of trial; but if you want to cut 10:08:40 them off, you better do it.

And Ellen, do we have a form, in other words?

What we need to do, any time you're going with default or default judgment, it's a rule of the Southern District, not of anywhere else, you got to give the other side notice by regular mail -- it says by certified mail, return receipt requested; but we always require regular mail, also.

As an old collection lawyer, I know if people don't take certified mail, my next question is "Did you send it at the same time?"

"Yes."

"How long ago?"

"Two, three weeks ago, gave them notice of this hearing."

The -- what is it, "You got your green card?"

"Well, it came back, you know, would not accept or nobody was home or, you know, can't find it."

And I said, "How about the regular mail?"

He said, "No, hasn't come back."

So I always consider that. Good enough notice. So always do it that way. That's up to you if you want to do that. You're local here, correct?

MR. GREENE: Yes, Your Honor.

THE COURT: Both of you-all local?

MR. WALKER: We're from Victoria, Your Honor.

THE COURT: Okay. So we don't need to run the other side back and forth. If there's anything short and ministerial you need to talk about, we can always put you on a speaker phone. I have hearings every morning like this at 15-minute increments or whatever you need.

10:10:00 So you can always get in. If it's something that can be handled quickly over the phone, let me know and we'll put you on speaker so you don't have to run up and back.

What else you want to talk about before we get down to trial date and everything else?

10:10:12 MR. GREENE: Well, Judge, I guess from our perspective the only other thing that we would request that the Court keep in mind when issuing the trial date is the fact that our client, Mr. Smith, is in Los Angeles, California. So in terms of scheduling, the expert, I think, is in Dallas.

10:10:28 THE COURT: All right. What are dates that are available for you? I'm sure you came with them because this is a final pretrial conference.

MR. GREENE: Yes, Your Honor.

THE COURT: What -- how long -- first of all, let me

10:10:36 ask the Plaintiff how long do you think this case will take for both sides, the whole trial, how long?

MR. GREENE: Two days, three days at the maximum, Your Honor.

THE COURT: You agree?

10:10:44 MR. WALKER: Yes, sir.

THE COURT: Okay. And don't forget from both sides, we need proposed findings of fact and conclusions of law. But I will tell you this: At the end of the trial, I always give you an opportunity to redo those based upon the evidence that came 10:10:58 out. And then, I'll ask it on a disk, and then we'll get -- you know, we'll get the opinion out as quick as we can.

Are there any -- again, I've not looked at the file recently. Are there any Fifth Circuit cases on this -- basically, on this area, treasures and, you know, the water 10:11:18 rights and all of that? Anything come close?

MR. GREENE: Judge, to us the 5th Circuit case that's controlling in the area of navigability which, essentially, is what the case boils down to from the intervenor's perspective, would be Richardson versus Foremost and Sanders versus Placid.

10:11:32 THE COURT: Are they in the file?

MR. GREENE: They should be in the file, Your Honor.

THE COURT: Okay. Do we have those on record?

THE LAW CLERK: Yes, sir.

THE COURT: We got them? Okay. All right.

10:11:40 Okay. Let me just tell you how I try a non-jury case. It moves fairly quickly really. A lot of these things -- I'm going to go down my jury checklist but a lot of these are not applicable.

All right. The only thing I need to tell you is 10:12:08 that my Court I don't require you to ask permission to approach a witness. You got free range of the courtroom. You can try your case like you do in state court, if you want. You can sit down and do it that way; you can stand at your place. There's a podium behind the pole. You can bring that forward, whatever you're most comfortable with.

If you need audio/visual -- and you probably will -- just talk to Ellen and it goes up down in this area here, and we can rig it up however you need it. That's all I need. I got a whole list for jury trials but non-jury is a lot shorter than that.

All right. What else you want to talk about? That's what you're here for.

MR. GREENE: Well, Judge, I think the Court is aware of the case. The only thing I would offer to clear up for the Court is Mr. Walker pointed out that Mr. Smith discovered this case by using Google Earth; and in fact, the case is actually extremely fascinating.

Mr. Smith found out about the case by reading -- literally reading a treasure book. He read the book, did some research, used modern technology; and that's how he found this ship.

THE COURT: What kind of a ship is supposed to be down there?

MR. GREENE: He thinks it's the Spanish Burgentine; but again, we don't know for sure. The story is that a ship left Mexico sometime in the early 1800s, was caught in a hurricane. The captain of the ship tried to outrun the hurricane by going up through Copano Bay into the Mission River, and ended up somewhere in either Melon Creek or the Mission 10:13:28 River or Melon Lake.

And over time, the ship eventually sank. The ship eventually -- we think right now it has moved while it's underground. It's constantly shifting because of the pressures of the ground. And absent us actually being able to go down, 10:13:52 there are a lot of mysteries surrounding what type of ship it is, what's on it.

THE COURT: I want the lawyers, both sides -- his side, especially -- to get out there.

What interest -- who do you represent actually, 10:14:02 Mr. Carroll, Mr. Walker?

MR. WALKER: Judge, we represent the landowner.

THE COURT: The landowner?

MR. WALKER: Yes, sir.

THE COURT: Okay. So it's a family, is it? What's 10:14:10 the name?

MR. WALKER: It's Sorenson. It's -- and it is fascinating, if I can have 30 seconds.

THE COURT: Go on. We got plenty of time.

MR. WALKER: There was -- the legend is -- and there's 10:14:24 some history to it. There was a ship going, I think, probably

10:14:46 from somewhere in Mexico; and it was -- and it was blown in by a big storm. But all the -- until now, all the uncontroverted history was it went up a creek called Burgentine Creek and it -- Burgentine Creek was named after the type of ship because it wrecked there.

And a family known as the Fagen (phonetic spelling) family came down, took the ship, and built a home out of it. That location is probably -- well, it's on the national wildlife refuge. It's probably 40 miles from where he says it 10:15:04 is. So there is a legend and there is history concerning this ship. But it's 40, 50 miles from where Mr. Smith says it now lies.

THE COURT: Now, do you have -- how do you get access to -- let's assume -- don't assume anything. I haven't heard 10:15:20 anything. Let's say, "Okay, you can go ahead and proceed." How do you gain access? Do you have to go over the Sorenson's property?

MR. GREENE: Judge, our contention is we're going to get in a boat, go up the Mission River to Melon Creek.

10:15:30 THE COURT: You're going to go up the river. I'm looking forward to seeing -- that's all right. Just answer the question.

MR. GREENE: That's my understanding, Judge.

THE COURT: Okay, very good. So if, indeed -- if, 10:15:40 indeed, it's as tough as you say it is to get up there with a dredge or whatever, then that might settle it right there. The question is do we allow him to give it a try based upon the location and the ownership? It's an interesting -- it's an interesting case.

10:15:54 Do you have any other questions before we get to a trial date?

MR. WALKER: I guess the question kind of goes to the issue of the site inspection. We would like to -- since we contend it's our property, we would like to accompany them out 10:16:10 there, and I can show them a shortcut through the Mission River to get there.

THE COURT: Do you have any problem with that?

MR. GREENE: I don't have any problem with it, Your Honor. I can talk to my client about it. He's very sensitive 10:16:22 about, you know, the location. So absent him having a problem with it, Judge, we should not have a problem.

THE COURT: Otherwise -- otherwise, if not the lawyers going out, just a representative from that side; and we'll keep them out of earshot. How about that? Keep them out of earshot 10:16:38 and let them look around, okay?

MR. WALKER: Yes, sir.

THE COURT: The lawyers don't have to go out. I don't want anybody -- maybe someone from your office or whatever, without the lawyers themselves. I don't want anyone interfering 10:16:46 with them poking around because that will be the last time they're out there before you come to trial. Then, you get a resolution and either they'll be out there in force or they won't be out there at all.

Now, as you see in something like this, it's all 10:16:58 or nothing. If you can work out a compromise, because who knows what's down there. Of course, it took -- Fisher with the Atocha, took it all the way to the US Supreme Court. So it would inure to both of your sides if you can work out something. If you can't, so be it. Sounds -- I'll try it. It's an 10:17:16 interesting case.

MR. WALKER: Okay. Our only -- we have offered them to come out and actually do a hand auger bore. Our only request is that if they take any samples that we get a split sample.

THE COURT: Sure.

10:17:28 No problem with that?

MR. GREENE: Well, I don't -- we discussed the option of doing a bore, Your Honor. My client has talked with other experts, and we don't know if the bore would necessarily be the right thing or if doing a magnetometer would be the more 10:17:42 appropriate thing.

THE COURT: Let's put it this way: If you go -- if you go with a bore, give them part of the sample. Give them -- or give them a double sample. Do it right next door and give them a sample. If you go with a magnetometer, under discovery 10:17:54 here in federal court, they'd be entitled to see it in any event. So under federal rules you'll have access to it. Maybe right not then and there.

MR. GREENE: And Judge, the only other problem with the bore is, as we stated in the complaint, we're talking about a 600-yard radius so --

THE COURT: Well, that's the concern they have. If you come up on dry land, I mean, which is absolute land of theirs, then let's go back and you're going to have to show me some law on that; but that's where we're premature.

Basically, don't get in his way of going out there and looking around. If you do a core sample, give them a copy of it. If you do a -- what is it, an electronic sample and you have, you know, statistics or a book on that, eventually, if you're even going to refer to it, they're entitled to see what an expert relies upon if it's something out there on the land. If you have any problem working together, if you want anymore parameters, give a call. You don't have to come back up.

All right. What are the dates that you -- that you would suggest? And let us take a look at our calendar. We'll try to work around it. What are the days or the weeks that are okay for your people?

MR. GREENE: Judge, any week in December is okay for us, of course, concerning the Christmas holidays; but absent that -- November is just a very difficult month for us.

THE COURT: All right. So we'll go to December.

You're on the November/December trial term. All right.

MR. WALKER: Judge, we have no actual trial setting. We have depositions and things that can be moved around. So December is pretty open for us.

10:19:26 THE COURT: Okay. I'll tell you what -- I'll tell you what --

Elizabeth, could you get my calendar off my desk, please. Actually, get my black calendar, you know, the black one in my briefcase. It's black with -- used to be blue pages, 10:19:42 white pages. Yes, my small little calendar.

All right. Hang on a second. We're going off the record.

(Discussion off the record.)

THE COURT: Okay. Now, we're looking at weeks in 10:21:08 December. Let me -- let me give them -- see what we can --

Ellen, you want to bring up the book?

(Side-bar discussion off the record between the Court and his staff.)

THE COURT: We have criminal preferentials.

10:21:44 (Side-bar discussion off the record between the Court and his staff.)

THE COURT: The problem is that we're looking for -- hang on. On one week in December we've got three criminal cases set.

10:23:30 Ellen, you want to come give me a hand.

THE CASE MANAGER: Yes, sir.

THE COURT: Three criminal cases set. We don't know if they're going to go or not but three of them.

The next week, we have what, a preferential?

10:23:38 THE CASE MANAGER: Yes, sir.

THE COURT: Criminal?

THE CASE MANAGER: Yes, sir.

THE COURT: And the 16th, preferential. I agree, we don't want to do anything the week of Christmas. That's 10:23:48 available. I can do -- because in January we begin the longest criminal case I have, and it's going to go awhile. There's just no way around that because we've been pre-trying it now for a year.

Well, I'll just ask you: Depending upon when do 10:24:08 you want to get the case tried that, in effect, unless these cases go away for December 2nd --

When will we know? Probably not until the last minute.

THE CASE MANAGER: Correct.

10:24:20 THE COURT: That's the problem. You got folks coming in from out of town.

Or you do?

MR. GREENE: Right, Your Honor.

THE COURT: Okay.

10:24:22 MR. GREENE: I think we both do, but they're in

Victoria and have to --

MR. CARROLL: Ours can drive up.

MR. WALKER: Yeah.

THE COURT: Yours?

10:24:28 MR. GREENE: Right. And once we get into the Christmas holidays and New Year's, I just --

THE COURT: Well, I'm not -- no, Christmas holidays and New Year's are two different things, okay? I have the availability -- I'm going to let you decide this. You know, 10:24:42 you're working at it. You're pros and so forth. I can do the case beginning -- for three days beginning Monday, December -- you know, December 29th, all right, or -- or keep you on hold; and we can set a tentative date, I guess, after I get back or after Hoeffner or just before that, whenever we can estimate. 10:25:12 That case is going to take awhile.

It just depends upon how you want -- you really want to get this thing tried because it's not that I'm not -- you know, heck, you want -- I mean, kidding aside, my -- my docket is absolutely current. These things are on here, and I'm 10:25:30 not sure if they're going to go away or not. Very often criminal cases plead out.

I could give you a trial as early as next week, all right? This is Wednesday. Go to -- next week, we got availability.

10:25:44 How about the week after that?

I'm not going to do this, by the way. I'm just telling you that if by some chance you want it, you can have it.

MR. GREENE: Thank you, Judge.

THE COURT: Yeah. No thank you for the idea of the ability to opt out, I gather.

10:25:56

(Side-bar discussion off the record between the Court and his staff.)

THE COURT: I could start you the afternoon of Wednesday, November 5th, and we could go the 5th, 6th, 7th; and if we have to hold over to the 10th. Or -- or -- or keep you on hold and see if any of these criminal cases go away and give you as much notice as we can.

10:26:34

Otherwise, I know it's an interesting case. You probably want to get it tried. So do tell them I could take you next week; or the week after, November 5th --

10:26:56

Right?

-- we just said is available. Those are two dates. Aside from that, we'll have to do the best we can, but it's going to be after that big criminal case because that's going to really lock us up. It's involving -- it's involving a lawyer being accused of paying kickbacks to a number of corporate executives in a big insurance company up in Hartford, Connecticut, in exchange that there would be -- they'd approve his personal injury settlements and then --

10:27:08

MR. CARROLL: I read that one.

10:27:32

THE COURT: -- and then they'd get some back allegedly from the lawyer for a piece of that; and that's very, very hotly disputed with the top lawyers in the city, you know, trying it.

Now, you tell me. I got one week for you. I'm
10:27:50 sorry, my case -- any time this summer -- if you had gotten in, I could have put you in. This summer we were looking for business. So you tell me.

First of all, let's go off the record.

(Discussion off the record.)

10:28:46 THE COURT: All right. What do you think? Do you want us to wait and see if anything loosens up with a promise you're not going to get overnight notice?

MR. WALKER: Judge, if -- maybe you can pencil in the 29th and 30th and --

10:29:02 MR. CARROLL: Of December.

MR. WALKER: -- of December. I think you gave that day.

THE COURT: Right. 29th, 30th, and --

MR. CARROLL: 31.

10:29:08 THE COURT: -- and 31.

MR. WALKER: Yeah. And really, I think it's more realistic a two-day trial. Then, if something falls through with the criminal docket, we can -- you can notify us and we can see if we can work it out the first part of December.

10:29:20 MR. GREENE: Right, Judge. If anything comes available early on in December and you can give us some notice --

THE COURT: Sure. What is the 20th? That's the day -- the afternoon -- no.

10:29:26 (Side-bar discussion off the record between the Court and the case manager.)

THE COURT: Starting at 10:00 on the 29th, right?

THE CASE MANAGER: Yes, sir.

MR. WALKER: Judge, there may be, what, a couple of

10:29:38 fact witnesses and a couple of expert witnesses?

MR. GREENE: Yeah. The way -- from our point, Judge, there's Mr. Smith, our expert; and we're trying to get one other person from the Corps of Engineers. We don't know yet. That person hasn't committed to testifying or not. Certainly, they

10:29:54 are an integral part of our case.

THE COURT: Are they local?

MR. GREENE: No, Your Honor. They'd be from Corpus Christi, I think. I think the person is located in Corpus. So those are the only three witnesses that I know of that standing

10:30:08 here today that we would be calling.

THE COURT: Okay. Let's do it. Let's put it there tentatively. If anything comes up in your schedule or on mine and if we can't -- we have to lop over. Why don't we tentatively then schedule it for what, 10:00 a.m.?

10:30:22 THE CASE MANAGER: Yes, sir.

THE COURT: November 29th.

THE CASE MANAGER: No, sir.

THE COURT: December 29th.

And on motions in limine -- this is a non-jury case. So unless it's a real screaming animal, I'm going to know. I don't rely on saying, well, it's a non-jury matter. I'll consider only things that are relevant but I will. So you know we have a lot more flexibility on exhibits and on motions in limine in a non-jury case. Also, when are the findings of fact and conclusions currently due?

MR. CARROLL: With the pretrial order, Your Honor.

THE COURT: Pardon me?

MR. CARROLL: They're due with the pretrial order at the end of this month.

THE COURT: The end of this month, okay.

All right. Why don't we move that off, Ellen, okay?

I'll give you some time on that, if you can work a case out. But even though -- now that we have a tentative trial date, there's no need to rush on that.

Bring up the book for a moment and we'll move that off.

Right now it's what, the 31st?

MR. CARROLL: I believe it's either the 30th or the 31st, Your Honor. But if we're going to get that early December trial date, we're probably going to need it as soon as possible anyway if we shake loose.

THE COURT: Right now, it's due -- all right. Let me ask you this: Do you want us to remain that or you want one extra week just to loosen up?

10:31:34

MR. GREENE: I think another week wouldn't hurt.

MR. CARROLL: We'll be happy to --

MR. WALKER: Particularly, if we're going to inspect the property, another week would make sense.

10:31:46

THE COURT: All right. We're going to change that the joint pretrial order now is due Friday, November 7th, instead of its current date.

MR. GREENE: And Judge, just a question in terms of actually going to the site. As long as it's done before trial, is that your only parameter?

10:32:02

THE COURT: That's correct. And also, enough time because they're under the federal rules, you know, Rule 16 disclosures and everything else. Eventually, you're going to have to exchange exhibits and all that. Did we have a date on that, also?

10:32:16

MR. CARROLL: Pretrial order, Your Honor.

THE CASE MANAGER: Yes, sir. The 31st.

THE COURT: Yeah. But by agreement, if they're being worked up and you want to give them a few extra days, it's no problem. Not extending the joint pretrial order but extending

10:32:28

10:32:48 all the exchanges. Just put it in writing that you've agreed between the parties that notwithstanding that everything needs to be done with the joint pretrial order on the -- on the following items, you've given them or they've given you the production date of a week before trial or ten days before trial, all right?

10:33:02 And if anything falls through, we'll let you know; but we're not going to force you on an overnight -- you know, an overnight trying the case if we can get it; but the week of Christmas we'll keep free.

MR. CARROLL: And Your Honor, if -- just for the sake of our experts and out-of-town witnesses, if the Court's docket opens up, will it be that first week in December or are there several weeks?

10:33:14 THE COURT: You say the others are definite, Ellen?

THE CASE MANAGER: Yes, sir.

THE COURT: We got some big ones after that?

Yeah, it would be that first week in December.

MR. WALKER: Thank you.

10:33:22 THE COURT: But again, if it's too close and your people already have schedules, we'll keep the 29th.

10:33:40 All right. If you need to get in and ask any questions, you can always call my case manager. If you need a resolution by the judge, just -- you know, just set up a phone conference. Any morning we can fit you in.

MR. GREENE: Thank you, Judge.
THE COURT: Okay. Anything further from the Plaintiff?
MR. GREENE: Nothing further, Your Honor.
10:33:46 THE COURT: Anything further from the defense?
MR. CARROLL: No, Your Honor.
THE COURT: Okay. If you work it out, please do; otherwise, it's going to be an interesting bench trial.
Okay, we'll see you.
10:33:52 MR. WALKER: Thank you, Judge.
MR. GREENE: Thank you.
MR. CARROLL: Thank you.
(Proceedings concluded at 10:30 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter, to the best of my ability.

By: /s/*Gayle L. Dye* *11-18-2008*
Gayle L. Dye, CSR, RDR, CRR Date